UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANNE DEUTSCH, GUARDIAN OF THE ESTATE OF JOSEPH DEUTSCH, Plaintiff,	:	
v.	:	Civil Action No. 3:04CV1253(CFD)
CIRCA BISTRO LLC and PHILLIP J. NARGI Defendants/Thirds Party Plaintiffs	:	
v.	:	
EDWARD R. FITZGERALD, JOHN GHIORZI, ELIZABETH M. BARRY, VICTORIAN HOUSE, INC., and EASTWAY ONE, INC. Third Party Defendants and Apportionment Defendants	:	

RULING ON MOTION TO DISMISS

The plaintiff, Anne Deutsch, as guardian of her son, Joseph Deutsch, brought this action against Circa Bistro LLC, owner and operator of the Circa Bistro restaurant in Waterbury, Connecticut, and Phillip Nargi, the permittee of Circa Bistro (collectively "Circa Bistro").[1] In a four-count complaint, Deutsch sets forth one claim of negligence and one claim of recklessness against each defendant. Circa Bistro now moves to dismiss counts one and two, the negligence counts, for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

[1]As evidenced by the caption to this ruling, the defendants have since brought an apportionment complaint under Connecticut law against several other individuals and corporate entities. Due to a voluntary dismissal, only one apportionment defendant remains a party to this action. That party is not implicated by, or involved in, the pending motion to dismiss. A separate ruling addresses the remaining apportionment defendant's motion to dismiss the apportionment complaint.

For the following reasons, the motion to dismiss is denied.

I Background

The complaint alleges the following: On the evening of August 6, 2002, Elizabeth Barry was served alcoholic beverages at Circa Bistro. Barry then left Circa Bistro and drove off in her car with Joseph Deutsch as a passenger. While traveling west on Interstate 84 in Waterbury, Barry's car struck an exit sign and then collided with a tractor-mower that was parked down the embankment of the highway. Joseph Deutsch suffered significant injuries in that accident. As a result of those injuries, his mother, Anne Deutsch, was appointed his guardian by the New Jersey Superior Court.

On July 24, 2004, Deutsch, acting in her capacity as Joseph's guardian, brought this action against Circa Bistro, alleging, *inter alia*, that Barry was intoxicated at the time of the accident and that her intoxication was the result of Circa Bistro's negligent service of alcohol.[2] Circa Bistro has moved to dismiss the two negligence claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

II Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court accepts all factual allegations in the complaint as true and draws inferences in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991). Dismissal is not warranted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Weiss v. Wittcoff, 966 F.2d 109, 112 (2d Cir. 1992). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale New Haven Hosp.,

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[2]Subject matter jurisdiction is based on diversity of citizenship, which is undisputed. 18 U.S.C. § 1332.

727 F. Supp. 784, 786 (D.Conn. 1990) (quoting Scheuer, 416 U.S. at 232). In other words, "[t]he question is 'whether or not it appears to a certainty under existing laws that no relief can be granted under any set of facts that might be proved in support of' the claims." Velez v. City of New London, 903 F. Supp. 286, 289 (D.Conn. 1995) (quoting De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978)). In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken. See Fed. R. Civ. P. 12(c): Courtenay Communications Corp. v. Hall, 334 F.3d 210, 213 (2d Cir. 2003); Leonard F. v. Israel Discount Bank of N.Y., 199 F.3d 99, 107 (2d Cir. 1999).

III Discussion

In its motion to dismiss, Circa Bistro claims that the negligence counts fail to state claims upon which relief may granted because, at the time of the accident, Connecticut did not recognize a cause of action for negligent service of alcohol against a restaurant or bar. Deutsch concedes that her cause of action, as Joseph's guardian, accrued on August 7, 2002, the date of the accident. See Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 520-21, 562 A.2d 1100 (1989) ("Substantive rights of the parties are fixed at the date upon which the cause of action accrued . . . In Connecticut, a cause of action accrues when a plaintiff suffers actionable harm")(citations and quotation marks omitted). Deutsch also concedes that Connecticut law did not recognize a cause of action for negligent service of alcohol on August 7, 2002. Deutsch argues, however, that the Connecticut Supreme Court's decision in Craig v. Driscoll, 262 Conn. 312, 813 A.2d 1003 (February 4, 2003), which recognized such a cause of action at common law, is entitled to retroactive effect, and, accordingly, her complaint states claims upon which relief may be granted. Circa Bistro maintains that Craig should not be applied retroactively.

No Connecticut appellate court has addressed the question of whether Craig should be

applied retroactively, and the Connecticut Superior Courts are split on this issue.[3] The majority of the Superior Courts have decided that Craig *does not* apply retroactively. See Andre Guillotin v. Karaoke, Inc. et al., 2005 WL 1869098 at *1 (Conn. Super. Ct., Jul 07, 2005) (granting summary judgment on the ground that Craig is not retroactive); Guillemette v. Rockville Lodge No. 1359 Benevolent and Protective Order of Elks of United States of America, Inc., 38 Conn. L. Rptr. 513, 2005 WL 375312, at *1-4, (Conn. Super. Ct. Jan 11, 2005) (granting motion to strike on the ground that Craig is not retroactive); Stavola v. Costa, 38 Conn. L. Rptr. 530, 2005 WL 408010 at *3 (Conn.Super.Ct., Jan 18, 2005) ("agree[ing] with the [line of] decisions that have determined that Craig v. Driscoll should not be given retroactive effect"); Campochiaro v. Stanwicks, 2004 WL 3105917 at *3-4 (Conn. Super. Ct., Dec. 6, 2004) ("Craig will be applied only prospectively to causes of action that occurred between February 4, 2003 and June 3, 2003," and not retroactively); Wills v. Hine, 2004 WL 2595888 at *2 (Conn. Super. Ct., Oct 20, 2004) (Craig should not be applied retroactively); Collar v. Da Cruz, 2004 WL 2095045 at *3 (Conn. Super. Ct., Aug 13, 2004) (same); Rossitto v. Ernies' Place Café, 37 Conn. L. Rptr. 341, 2004 WL 1664227 at *3 (Conn. Super. Ct., Jun 29, 2004); (same); Estate of Ridgaway v. Silk, 36 Conn. L. Rptr. 872, 2004 WL 1098506 at *3-4 (Conn. Super. Ct., Apr 28, 2004) (same).

However, a number of Superior Courts have decided that Craig *does* apply retroactively. See Shortt v. Senor Panchos, Inc., 2005 WL 1394780 at *3 (Conn. Super. Ct., May 17, 2005) (Craig applies retroactively); Blackwell v. Barone's Sporting Café, Inc., 2005 Wl 647601 at *3

[3]"Where the highest court of a state has not resolved an issue, the Second Circuit has held that a federal court 'must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State.'" Kline v. E.I. DuPont de Nemours & Co., Inc., 15 F.Supp.2d 299, 302 (W.D.N.Y.1998) (citing Travelers Ins. Co. v. 633 Third Assoc., 14 F.3d 114, 119 (2d Cir. 1994)); see also Cunninghame v. Equitable Life Assur. Soc. of U.S., 652 F.2d 306, 308 (2d Cir. 1981) ("When there is an absence of state authority on an issue presented to a federal court sitting in diversity . . . the federal court must make an estimate of what the state's highest court would rule to be its law").

(Conn. Super. Ct., Jan 10, 2005) (same); Raymond v. Duffy, 38 Conn. L. Rptr. 562, 562, 2005 WL 407655 at *8 (Conn. Super. Ct., Jan 13, 2005) (same); Amato v. Randall's Restaurant, 37 Conn. L. Rptr. 608, 2004 WL 1966099 at *2 (Conn. Super. Ct., Aug 9, 2004) (applying Craig retroactively); Raposa v. Lynam, 36 Conn. L. Rptr. 174, 2003 WL 22962859 at * 2 (Conn. Super. Ct., Dec. 3, 2003) ("find[ing] no barrier to a retroactive application of [Craig]").

All of the Superior Court decisions cited previously analyzed the retroactive effect of Craig v. Driscoll pursuant to the three-part test set forth in Ostrowski v. Avery, 243 Conn. 355, 377 n.18, 703 A.2d 117 (1997), or at least adopted the reasoning of another court that had applied that three-part test. The three-part test provides:

> A common law decision will be applied non-retroactively only if: (1) it establishes a new principle of law, either by overruling past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . (2) given its prior history, purpose and effect, retrospective application of the rule would retard its operation; and (3) retroactive application would produce substantial inequitable results, injustice or hardship.

Ostrowski, 243 Conn. at 377 n.18 (citations omitted; quotation marks omitted.). As an initial matter, Deutsch claims that all of the Superior Courts erred in applying that three-part test because: (1) the Connecticut Supreme Court has not officially "adopted" or "applied" that test, as stated by the Superior Court decisions; (2) the Connecticut Supreme Court has never used the three-part test to hold that a decision recognizing a *civil* cause of action applied prospectively only;[4] and (3) the case upon which the Connecticut Supreme Court relied for that three-part test, Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), has been overruled.

As to Deutsch's first argument, the Court has discovered a disparity in the language of the Connecticut Supreme Court in Ostrowski as it appears in different reporters. The Connecticut

[4]Deutsch concedes that the Connecticut Supreme Court has used that test to find that a new criminal decision was entitled to prospective application only. See State v. Harrell, 199 Conn. 255, 267, 506 A.2d 1041 (1988).

Reports, the official reporter for Connecticut cases, states in Ostrowski, footnote 18 that, "In Neyland v. Board of Education . . . we *discussed* the three-part test set out in Chevron Oil Co. V. Huson . . . for determining whether a decision must be applied prospectively only." 243 Conn. 355, 377 n.18 (emphasis added). The same footnote, as reported in unofficial reporters, states that "we *adopted* the three-part test set out in Chevron Oil Co. v. Huson . . . for determining whether a decision must be applied prospectively only." 703 A.2d 117 (1997) (emphasis added). As Deutsch points out—although unaware of the different language in the different publications of footnote 18—the latter statement does not appear to be accurate, as in Neyland the Court rejected the plaintiffs' "suggest[ion] that we borrow the analysis of the federal courts, which have developed comprehensive, if somewhat confusing, rules on the subject [i.e., the Chevron three-part test]." Neyland, 195 Conn. at 179. Indeed, after examining each factor of the Chevron test, the Court stated: "[W]e do hold the Chevron Oil test inapplicable to jurisdiction issues . . . ." Id. at 182. Moreover, the Court quoted from a concurring opinion from Judge Meskill in Holzsager v. Valley Hospital, 646 F.2d 792, 798 (2d Cir. 1981), which the Court believed "express[ed] some concerns [about Chevron] which we share." Id. Consequently, the Court concludes it is unclear whether the Connecticut Supreme Court has adopted the Chevron test. But it is clear that the Connecticut Supreme Court has at least considered it.[5]

As to Deutsch's second argument, it appears that the Connecticut Supreme Court has never found that a decision announcing a new cause of action should only be applied prospectively under the Chevron test. This Court, however, fails to see how this precludes a subsequent court from reaching such a conclusion. To the contrary, all it suggests is that such a

[5] The Court has brought the discrepancy in the language of Ostrowski as it is reported in the official Connecticut Reports and unofficial reporters published by Lexis and West Group to the attention of the Connecticut Law Journal, the publisher of the Connecticut Reports. Librarians with the Law Journal will notify the other publishers. As of the date of this ruling, a resolution of the discrepancy has not yet been reached.

case is rare, and has not been before the Connecticut Supreme Court at this time.

As to Deutsch's third argument, it is true that in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993), the United States Supreme Court overruled the three-factor test from Chevron and adopted a strict rule requiring retroactive application of new decisions to all civil cases still subject to direct review: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate our announcement of the rule." If this case presented the question of whether a United States Supreme Court decision was entitled to retroactive effect, therefore, Harper would control. The issue actually presented in this case, however, is whether a decision from the Connecticut Supreme Court is entitled to retroactive effect, and to answer that question this Court must defer to the approach of the Connecticut courts, confusing as it may be, as states are free to determine the extent to which new decisions from their highest courts are to have retrospective effect. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932); Neyland, 195 Conn. at 179; Reed v. Reincke, 155 Conn. 591, 596, 236 A.2d 909 (1967). Since Harper was decided in 1993, the Connecticut Supreme Court has continued to at least cite the three-part test from Chevron. See, e.g., Denardo v. Bergamo, 272 Conn. 500, 510, 863 A.2d 686, 692 (2005); Marone v. City of Waterbury, 244 Conn. 1, n.4, n.18, 707 A.2d 725 (1998); see also State v. Salmon, 250 Conn. 147, 166-67, 735 A.2d 333, 343 (1999). Finally, all the Connecticut Superior Courts which have decided the retroactivity of Craig v. Driscoll have applied the Chevron test, apparently relying on the language of the unofficial reporters. Consequently, this Court will apply the three-part Chevron test to determine whether the Connecticut Supreme Court's decision in Craig v. Driscoll is entitled to retroactive effect.[6]

[6]Deutsch also argues that the second and third factors of the Chevron Oil test cannot be considered in the context of Circa Bistro's motion to dismiss. This argument is without merit.

In doing so, however, the Court is mindful that the Connecticut Supreme Court has also expressed that "judgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . ." Myrone v. Waterbury, 244 Conn. 1, 10-11, 770 A.2d 725 (1998) (citing State v. Ryerson, 201 Conn. 333, 339, 514 A.2d 337 (1986)). Moreover, that Court has stated that, "[a]s a rule, judicial decisions apply retroactively . . . Indeed, a legal system based on precedent has a built-in presumption of retroactivity." State v. Ryerson, 201 Conn. 333, 339, 514 A.2d 337 (1986) (quoting Robinson v. Neil, 409 U.S. 505, 507-508 (1973) and Solem v. Stumes, 465 U.S. 638, 642 (1984)).

1) New Principle of Law

As to the first Chevron factor, neither party disputes that Craig v. Driscoll "establishe[d] a

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See Welch v. Cadre Capital, 735 F.Supp. 467, (D.Conn. 1991) (applying Chevron in context of Rule 12(b)(6) motion to dismiss), aff'd 946 F.3d 185 (2d Cir. 1991); see also Wiener v. Napoli, 772 F.Supp. 109, 118 (E.D.N.Y. 1991) (applying Chevron Oil as an alternative ground for dismissal under Rule 12(b)(6)); Williams v. Chase Manhattan Bank, N.A., 728 F.Supp. 1004, 1008 n.1 (S.D.N.Y. 1990) (applying Chevron Oil in context of a Rule 12(b)(6) motion to dismiss); Marino v. Bowers, 483 F.Supp. 765, 767-69 (E.D.Pa. 1980) (same); see also Sibley v. Faulkner Pontiac-GMC, Inc.,1990 WL 116226 (E.D.Pa., Aug 8, 1990) (applying Pennsylvania law, which is based on Chevron Oil, in context of Rule 12(b)(6) motion to dismiss).

In regard to the second factor, the Supreme Court in Chevron Oil did note that a court "must weigh the merits and demerits *in each case* by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Chevron Oil, 404 U.S. at 106-07. However, that statement merely reflects that the Court has to look in each case at the rule in question, and the cases involved in the adoption of the new rule, and not to the individual facts of the case before it, as argued by Deutsch. Under the third factor, the Court does need to determine whether "retroactive application would produce substantial inequitable results, injustice or hardship." This inquiry, however, is not limited to a specific inquiry into the factual circumstances of the case before it, however, but rather is a general inquiry as to all parties that may be affected by such application. See, e.g., Cipriano v. City of Houma, 395 U.S. 701, 705 (1969) (focusing on the the "[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect," and not just the parties involved); Marino, 483 F.Supp. at 767-69 (considering, under the third factor, the effect retroactive application would have on third parties and the workload of the courts). Therefore, consideration of the Chevron Oil factors in the context of the defendants' motion to dismiss does not violate the standard of review applicable to Rule 12(b)(6) motions.

new principle of law" by "overruling past precedent," namely, Quinnet v. Newman, 213 Conn. 343, 353, 568 A.2d 786 (1990), and recognizing for the first time a common law action for negligent service of alcohol. Consequently, the first factor counsels in favor of a finding that Craig does not apply retroactively.

2) Operation of the New Principle

The second factor looks to whether, "given its prior history, purpose and effect, retrospective application of the rule would retard its operation." The defendants contend that retroactive application of Craig would run counter to the stated intent of the legislature, as evidenced by it statutory abrogation of the holding in Craig and the public policy expressed thereby.[7] The defendants' argument is without merit, however, because it is the history, purpose and effect of the new rule, and the intent of the Connecticut Supreme Court in announcing that new rule, that must be considered under this factor—not the intent of the Connecticut legislature concerning any *subsequent* actions it took. Blackwell, 2005 WL 647601 at *3 ("The question is whether retroactive application of the rule would retard the rule's operation, not whether it would conflict with statutes or other public policy"). In Craig, the Connecticut Supreme Court failed to expressly indicate that retroactive application of the new rule announced therein would retard its application.[8] To the contrary, the decision in Craig affirmed the judgment of the Appellate

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[7]The Connecticut legislature's response to the decision in Craig was Public Act 03-91, which modified the Dram Shop Act, Conn. Gen. Stat. § 30-102, in two respects: First, it increased the amount available to an injured person from twenty thousand dollars to two hundred fifty thousand dollars. Second, it statutorily overruled the recognition of a common law action for negligent service of alcohol in Craig by adding the following language to § 30-102: "Such injured person shall have no cause of action against such seller for negligence in the sale of alcoholic liquor to a person twenty-one years of age or older." P.A. 03-91 was adopted on June 3, 2003, four months after the decision in Craig, which was released on February 4, 2003.

[8]As Deutsch notes in her brief, the Connecticut Supreme Court included such limiting language in other cases. See, e.g., State v. Troupe, 237 Conn. 284, 305, 677 A.2d 917 (1996) (concluding that the holding announced therein would be entitled to prospective effect only, and that the Court saw "no reason to order a new trial in this or any other case in which testimony had

Court, which had concluded that trial court improperly struck a negligent service of alcohol count from the complaint. In other words, in announcing a new rule and overruling Quinnett, the Connecticut Supreme Court sanctioned the use of that new rule in the plaintiff's complaint against the defendant in Craig v. Driscoll. See also Craig v. Driscoll, 35 Conn. L. Rptr. 308, 2003 WL 22133983 (Conn. Super. Ct., Aug 28, 2003) (proceeding on remand from the Connecticut Supreme Court) (finding that Public Act 03-91 only had prospective effect, and, therefore, the plaintiff's case could proceed pursuant to the Supreme Court's decision recognizing a common law cause of action for negligent service of alcohol). Thus, if retroactive application of the new rule in Craig did not retard the rule's objective, then retroactive application in this case similarly will not retard its objective. Indeed, the objective of the rule announced in Craig was to rectify prior inconsistencies in the law concerning causes of action for negligent service of alcohol, and to provide injured parties full compensation if they could prove the requisite level of causation. Craig, 262 Conn. at 328. Limiting that rule to *prospective* application, as advocated by Circa Bistro, would therefore retard its objective. Consequently, the second factor counsels in favor of a finding that Craig does apply retroactively.

3) Hardship

The third and final factor looks to whether "retroactive application would produce substantial inequitable results, injustice or hardship." Circa Bistro, quoting Estate of Ridgaway, 2004 WL 1098506, argues that retroactive application would cause hardship and injustice to the server of alcohol "who purchased insurance and trained employees under the law as it existed prior to Craig v. Driscoll . . . ." This argument is rejected for three reasons. First, as noted in the previous section, the Connecticut Supreme Court permitted retroactive application of the new rule to the defendant in Craig, and failed to discuss potential hardship or inequity to servers of

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been properly permitted under our former version of the constancy of accusation doctrine").

alcohol as a result of its decision. Second, in support of its decision to overrule its prior decision and subject servers of alcohol to a new cause of action for negligent service of alcohol, the Connecticut Supreme Court noted that "[r]arely do parties contemplate the consequences of tortious conduct, and rarely if at all will they give thought to the question of what law would be applied to govern their conduct if it were to result in injury." Craig, 262 Conn. at 330 (quoting Conway v. Wilton, 238 Conn. 653, 661, 680 A.2d 242 (1996)). Third, as recently was noted by one Superior Court:

> there may also be inequity in limiting the recovery of the victims of a catastrophic alcohol-related auto accidents occurring prior to the Craig decision to the old dram shop cap of $20,000 when persons injured in the four months after the February 4, 2003 Craig decision can recover an unlimited amount and persons injured after the June 1, 2003 amendment of the dram shop act can recover up to $250,000.

Blackwell, 2005 WL 647601 at *3. In sum, the Court finds that the third factor counsels in favor of a finding that Craig does apply retroactively.

IV Conclusion

For all of the forgoing reasons, this Court joins the line of decisions holding that the Connecticut Supreme Court's decision in Craig v. Driscoll, which announced a new civil cause of action for negligent service of alcohol, applies retroactively. Consequently, Circa Bistro's motion to dismiss counts one and two for failure to state a claim upon which relief may be granted **[Doc. #17]** is **DENIED**.

SO ORDERED this 13th day of September, 2005 at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE